Editor's Note: Appeal filed, Civ. No. 97-668-B (E.D. OK 1997).

FARRELL-COOPER MINING CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 96-430 Decided October 28, 1997

Appeal from a Decision by Administrative Law Judge David Torbett sustaining notice of violation No. 94-030-246-01. Hearings Division Docket No. DV 94-16-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof

A Decision sustaining issuance of an NOV because reclamation did not achieve approximate original contour of land subjected to surface mining is affirmed in the absence of a showing of error therein.

APPEARANCES: John S. Retrum, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Office of Surface Mining Reclamation and Enforcement; Thomas J. McGeady, Esq., Vinita, Oklahoma, for Farrell-Cooper Mining Company.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Farrell-Cooper Mining Company (Farrell-Cooper) has appealed from a May 29, 1996, Decision by Administrative Law Judge David Torbett that sustained notice of violation (NOV) No. 94-030-246-01. The NOV was issued on September 8, 1994, by the Office of Surface Mining Reclamation and Enforcement (OSM) to Farrell-Cooper for failure to achieve approximate original contour (AOC) of lands disturbed by mining at the Red Oak Mine in Latimer County, Oklahoma, contrary to sections 515(b)(2) and (3) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1265(B)(2) and (3) (1994), and implementing regulations at 30 C.F.R. §§ 816.102 and 816.133. Motions in the alternative for issuance of a stay of Judge Torbett's Decision or reinstatement of a temporary relief order issued in 1994 by Judge Torbett were denied by an order issued by this Board on October 7, 1996.

Reclamation by Farrell-Cooper of the site of a 70-acre pasture owned by Robert Brown that was included within the Red Oak mining operation remains an issue before us. The reclamation of this site is questioned by the NOV issued by OSM on September 8, 1994, as modified on September 21, 1994, that required Farrell-Cooper to eliminate a spoil pile left by mining on the Brown pasture by placing it into three adjacent pits, "water impoundments," and to backfill and grade the mined area so that the reclaimed land closely resembles the "general surface configuration of the land." The facts of this case, as found by Judge Torbett in his Decision, have not been challenged by Farrell-Cooper and are supported by the record developed at hearing. We approve and adopt the findings of fact made by Judge Torbett on May 29, 1996, and attach his Decision hereto as Appendix A.

In support of this appeal, Farrell-Cooper raises three issues: The first concerns whether OSM was barred by doctrines of issue preclusion from issuing the Federal NOV to Farrell-Cooper because Oklahoma had previously issued a State NOV covering the same activity; the second is whether OSM lacked authority to examine a State decision permitting the structures (spoil and pits) cited in the Federal NOV to be left by Farrell-Cooper; the third is whether OSM could issue a Federal NOV if conditions left by Farrell-Cooper met State AOC requirements. See Stay Petition at 2. As to the first two issues raised, Farrell-Cooper cannot prevail on appeal because these questions are not relevant to the authority of OSM to issue the Federal NOV in this case. The policy announced by SMCRA obviates reliance upon the preclusion doctrine when state enforcement proceedings have not abated violations of SMCRA. See Ron Deaton v. OSM, 126 IBLA 320, 326 (1993), and cases cited therein. The jurisdiction of OSM to cite violations of SMCRA is not affected by the possibility that Oklahoma may have approved conditions left by Farrell-Cooper. Id. The authority of OSM to proceed in cases such as this depends entirely upon whether a 10-day notice of alleged violation was given in conformity to 30 C.F.R. §§ 842.11(b) and 843.12(a). See Triple R Coal Co. v. OSM, 126 IBLA 310, 317 (1993), and authority cited. Since Farrell-Cooper does not dispute that OSM took appropriate action under the cited regulation implementing SMCRA, there is no serious dispute in this case that OSM acted properly within the authority delegated by law to the agency. Id.

[1] Judge Torbett, see Appendix A, found that Farrell-Cooper was not properly authorized by the State to leave water impoundments of this size on Brown's pasture and also concluded that the 30-acre spoil pile left thereon was inconsistent with reclamation to AOC that was needed in order to restore the land to a condition suitable for pasture use. Id. at 6. Sustaining the NOV, he concluded that Farrell-Cooper left a spoil pile and a 23-acre water impoundment on the 70-acre Brown pasture, (Appendix A at 3), creating a condition that failed to conform to both State and Federal AOC criteria, (Appendix A at 5, 6). In so doing, he found that the State had failed to follow State regulations requiring notice to the landowner of proposed revisions to the reclamation plan, (Appendix A at 5).

In an appeal brief filed July 19, 1996, Farrell-Cooper argues that evidence produced at the hearing before Judge Torbett shows "no more than [that] reasonable people might differ on the issue." (Brief at 10.) It is contended that the judgment of OSM may not be substituted for that of the State in such matters, but that the burden in this case rests with OSM to "demonstrate that [the State] arbitrarily or capriciously decided that Farrell-Cooper's mine plan met the requirements of AOC." (Brief at 9.) Agreeing that disagreements concerning pond "impoundment size" and "increased elevations" remain to be determined, id. at 13, Farrell-Cooper then takes the position that "a 20 foot deviation from pre-mining topography" does not violate AOC criteria and discusses authority indicating that some deviations from original contour are permissible. Id. at 14 through 17. The testimony of the landowner concerning the ability of the mined land to support planned after-mining pasture and hay crop uses is dismissed as "incompetent," id. at 17, while leaving 3 water impoundments covering 23 acres (instead of an approved 12-acre impoundment to which the landowner had consented after notice of the change in reclamation was provided) is defended as "suitable" given the size and nature of the field in question in relation to the overall mining operation. Id. at 20, 21.

An answer to the Farrell-Cooper brief filed by OSM on August 13, 1996, points out that use of the 70-acre field before mining was for pasture, and that this use was planned to continue after mining was completed by all permits issued to Farrell-Cooper, including permits numbered 006, 2011, and 4028 (Answer at 6). The OSM Answer also frames the factual issue raised on appeal around the three impoundments and the spoil pile left in the 70-acre pasture, contending that their presence violates AOC and that the record establishes the State permitting authority failed to follow its own rules governing permit revisions when notice was not given to the landowner of a revision that allowed conditions incompatible with use of the land as pasture to remain after mining. (Answer at 1, 29, 30.)

This factual question was dealt with comprehensively by Judge Torbett; his Decision, based upon the record produced at hearing, finds that the spoil pile and pits left on the Brown pasture are contrary to State criteria governing such operations, and that permit revisions purporting to authorize such conditions were arbitrary, capricious, and an abuse of discretion. Farrell-Cooper has not shown any error in this finding, but instead repeats arguments raised before, but rejected by, Judge Torbett. In taking this approach, Farrell-Cooper mistakenly argues that OSM should be obliged to carry the burden of persuasion on appeal from Judge Torbett's Decision; the burden of persuasion in such cases, however, rests with the party seeking relief. Roblee Coal Co. v. OSM, 130 IBLA 268, 276 (1994). Because Farrell-Cooper has failed to show error in the findings announced by the Decision here under review, we adopt that Decision as our own and affirm the Decision issued by Judge Torbett. See Appendix A.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

May 29, 1996

FARRELL-COOPER MINING CO., Applicant	:	Docket No. DV 94-16-R
v.	:	Application for Review and Temporary Relief
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, Respondent	:	Notice of Violation No. 94-030-246-001

DECISION

Appearances: Thomas J. McGeady, Logan & Lowry, Vinita, Oklahoma, for the Applicant

John S. Retrum, Office of the Field Solicitor, Denver, Colorado, for the Respondent

Before: Administrative Law Judge Torbett

Procedural History

On September 7, 1994, the Office of Surface Mining (OSM) issued Notice of Violation (1 NOV) No. 94-3-246-01 to the Applicants for failure to achieve approximate original contour in violation of Oklahoma law and 30 C.F.R. § 816.102, 816.133, and 816.780 (1993).

Farrell-Cooper Mining made a timely petition for review of the NOV and for temporary relief. On November 15, 1994, the undersigned entered an order granting temporary relief.

A hearing on the petition for review was held on March 21-23, 1995, in Tulsa, Oklahoma, before the undersigned.

Facts of the Case

The Applicant owns Permit 4028 issued in 1984. The permit covers several areas located in Latimer County, Oklahoma. Robert and Elizabeth Brown own 400 acres of pastureland in or near Latimer County, including 100 acres inside the area covered by the Applicant's permit (Tr. 32-33, 194-95).

The Applicant has disturbed 70 acres in the area of the Brown property. Before mining these 70 acres had a slope of 0.5%. The land sloped in the direction of Brazil Creek, a perennial stream. The Browns used their property to graze cattle and grow hay. It is located within an area classified by the Soil Conservation Service as prime farmland. No impoundments of water existed on the land prior to mining. Post-mining use will be grazing pasture land (Tr. 64-67, 84, 96, 131-32, 197-99, 221-24, 256-57, 413, 428-29).

In June of 1988 the Applicant sought to modify its permit through Proposed Revision number 808. This revision allowed six final cut impoundments; three on the Brown's property. The proposal showed that the area of the three impoundments would be 5.88, 3.81, and 2.43 acres for a total of twelve surface acres of water. The spoil map for 808 showed that a spoil pile would be located north of the impoundments (Tr. 89, 92-93, 135, 231, 364).

Along with the proposed revision the Applicant submitted a copy of its 1982 lease with the Browns and an affidavit signed by the Browns in 1988 (Tr. 96-98, 130-31; Exhibits R-14, R-15). The lease agreement required that all spoil banks be graded to fit the existing topography of the land and that one reservoir would be left in the strip pit area "as large and as deep as good engineering principles will permit. This is in the event approval can be secured from the State and/or Federal Governments for a water reservoir in the strip pit area." (Exhibit R-14 at 3).

The affidavit was in response to a letter written to landowners by Robert P. Cooper, a vice president for Farreil-Cooper. The letter to Brown states that the Applicant will replace a minimum of twelve inches of soil on the farmland and informs the Browns that the Oklahoma Department of Mines (ODOM) required the landowners to sign the enclosed affidavit. The letter does not disclose the Proposed Revision 808. One section of the document acknowledges that the Browns had requested that Farrell-Cooper leave final pit impoundments of water as large and deep as possible. The section also states that if mining ceased before reaching final cut number sixteen that the Browns approved leaving the final pit impoundment on the pit where mining ceased. The Browns also approved sharing an impoundment on their west boundary with the owners of the adjoining parcel (Exhibit R-15).

ODOM approved Revision 808 in 1988 (Tr. 84). The revision requires that old pit highwalls and spoil piles be eliminated and that deviations from approximate original contour will be limited to six impoundments. The ODOM reports also states that the landowner had approved a land use change of 32.5 acres from pastureland to developed water resources (Exhibit R-16 at 2, 13).

In May of 1990 the Applicant constructed impoundments numbered 12, 13, and 14 on Brown's property. The impoundments were twice the approved size and covered 23 acres rather than the approved 12. In December of 1990 the Applicant sought to modify its permit though Revision 1004 to allow the larger impoundments. ODOM denied Permit Revision 1004, saying that spoil existed on the site to reduce those impoundments. ODOM had not approved the size of the impoundments at the time of the hearing (Tr. 102, 104, 145 174, 378). The landowner estimates that he will require 0.23 acres of water to raise 50 mother cows and that Brazil Creek will more than supply his needs (Tr. 221-224).

The Applicant sought revision again in October of 1992. Proposed Revision 1145 addressed the contours of the spoil pile and sought approval of the final configuration and size of impoundments 12, 13, and 14 (Tr. 111-12, 365, 369). In 1992 landowner Brown voiced his objections to Revision 808 and Proposed Revision 1145 to the state agency by letter (Tr. 206, 378, 429; Exhibit R-20).

In response to Brown's letter ODOM agreed to change the status of the proposed revision from minor to major revision and to hold administrative proceedings to review the revision (Tr. 117, 133, 166).

OSM became aware of the approximate original contour issue on Brown's property in 1993 through both ODOM and the landowner. Brown requested a federal inspection of his property (Tr. 56-58, 69). Following the inspection conducted in September of 1993, OSM issued a Ten Day Notice (TDN) to the State saying that Farrell-Cooper had failed to achieve approximate original contour (AOC) (Tr. 58; Exhibit R-7).

ODOM responded to the TDN by stating that it would review the violations noted in the TDN at the close of the administrative proceedings brought by Brown (Tr. 61-62; Exhibit R-8).

On October 27, 1993, OSM conducted a follow-up inspection of the property and observed three large pit impoundments resulting in a spoil pile. The inspector discovered Revision 808 which he stated would leave "spoil out of the holes and holes in the ground..." (Tr. 71-72; Exhibit R-9). The slope of the spoil pile was a 7.4% grade compared with the pre-mining slope of 0.5%. The spoil pile covered 30 acres and raised the land twenty feet (Tr. 43, 70, 102, 161, 282).

In his report the OSM inspector noted that the federal government would not take any action until the ODOM director finalized Brown's appeal of Revision 1145. On December 8, 1993, ODOM recommended that Proposed Revision 1145 be approved over the landowners' objection (Tr. 80-81, 134, 166; Exhibit R-23).

In January of 1994 a hydrologist with OSM visited the site and reviewed permit documents. He determined that the size and configuration of the impoundments failed to support post-mining land use. He also determined that there were no plans in 1145 for constructing the three impoundments and that there was no approval for the size of the impoundments (Tr.134, 254; Exhibits R-23, R-34).

The hydrologist estimated that 1.7 million cubic yards of spoil was removed from the three impoundments and that the spoil pile was approximately 1 million yards and large enough to fill two of the ponds (Tr. 163-64).

In February of 1994 OSM determined that ODOM's response to the TON was inappropriate because Revision 1145 did not contain sufficient information to provide a basis for the approval. OSM determined that the revision had violated Oklahoma laws governing post-mining land use and disposal of excess spoil (Tr. 167; Exhibit R-20).

Oklahoma requested an informal review of OSM's decision in March of 1994. A few days later an OSM mining engineer visited the Brown property and could find no justification for leaving the impoundments and spoil as they were (Tr. 282; Exhibit R-41). In May of 1994 the deputy director of OSM upheld the decision to find Oklahoma's decision inappropriate (Tr. 170).

Farrell-Cooper ceased reclamation in the summer of 1994. In September of 1994 an OSM inspection found that the impoundments and spoil pile violated the AOC requirements of Oklahoma (Tr. 35, 39, 172; Exhibit R-2). The NOV, as modified, required the Applicant to backfill and grade the mined area so that the reclaimed area closely resembles the general configuration of the land prior to mining with spoil piles eliminated. The spoil pile must be utilized to fill the three impoundments located on Brown's property (Exhibit B).

Issues

The issue presented here is whether NOV No. 94-030-246-01 was appropriately issued and should be sustained.

Discussion and Conclusion

In review of § 521 Notices of Violation the Respondent has the burden of going forward to establish a prima facie case as to the validity of the notice. The ultimate burden of persuasion rests with the applicant for review. 43 C.F.R. § 4.1171 (1995). A prima facie case is shown when sufficient evidence is presented to establish sufficient facts which, if not contradicted, will justify a finding in favor of the party presenting the case. If evidence sufficient to present a prima facie case is not rebutted the violation will be sustained. S&M Coal Co., 79 IBLA 350 (1984).

The Applicant argues that the NOV should be vacated because Oklahoma is a primacy state and OSM had no jurisdiction over the permit site. OSM may make a federal inspection of mining sites when it has reason to believe that a violation of the Surface Mining Act exists. OSM may issue a Ten Day Notice to a state program for failure to take appropriate action on existing violations. A state's response which is not arbitrary, capricious, or an abuse of discretion shall be considered to be an appropriate action to cause the violation to be corrected or a good cause why the violation will not be corrected. The Applicant argues that Oklahoma has decided that the three impoundments and resultant spoil pile are not a violation and that this state decision was not arbitrary, capricious, or an abuse of discretion. 30 C.F.R. § 842.11 (1995).

The undersigned disagrees. Although Oklahoma law allows exceptions to the approximate original contour regulations, the evidence demonstrates that ODOM did not follow its own regulations.

Under the AOC regulations spoil piles must be eliminated. Permanent water impoundments may be permitted where ODOM determines that they comply with certain criteria. DOM/RR § 701.5 (1994).

Permanent impoundments such as those left on the Brown property must be of the size and configuration to be adequate for its intended purposes and the impoundment must be suitable for the intended postmining land use. DOM/RR § 816.49 (1994).

Section 816.133 of these regulations allows higher or better uses of the land only after approval by ODOM. ODOM must consult with the landowner, the proposed postmining uses must have a reasonable likelihood of achieving the use and the usage must not be impractical or inconsistent with land use policies. Id.

The evidence presented at the hearing shows that ODOM believed Brown desired three impoundments on his property and that he required 32.5 acres of water resources. Brown was never directly contacted by ODOM officials. The documents tend to show that he originally approved one impoundment in the final pit cut. The

Browns have never proposed a postmining land use other than the grazing of a few head of cattle or growing hay to feed cattle. The existing creek has always supplied adequate water for this task (Tr. 64-67, 102, 197-99, 221-24).

The Applicant left 23 out of 70 acres covered in water and a spoil pile which covers approximately 30 acres. Nothing in the state's documents indicated any rational basis for granting Revision 1145 on property which was intended to graze cattle and which enjoyed a perennial source of water. The Browns have never indicated that they planned to use the vast amounts of water present in the impoundments for stock ponds, catfish farming, fire protection, etc. The three impoundments and the resultant spoil pile serve no purpose and are highly impractical for the intended use of the land. They are not suitable for intended postmining land use. When ODOM granted the revisions allowing these impoundments contrary to its own regulations it abused its discretion and acted in an arbitrary manner. Therefore, OSM acted appropriately by finding Oklahoma's response inadequate and in issuing the NOV in question.

ORDER

Therefore, for the reasons set out above the undersigned hereby sustains NOV No. 94-030-246-01.

David Torbett
Administrative Law Judge

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